

Conflict of Interest and ERB Members

Indiana Code 13-13-8-11 provides that each member of the board must disclose any potential conflicts of interest relating to permits or enforcement orders under the federal statutes that IDEM has the responsibility of implementing, as provided under state law. (IC 13-13-5-1) Only the federal Clean Air Act and Clean Water Act have specific laws and regulations that speak to the issue of conflict of interest for state boards. The language of the Indiana state statute and the pertinent language under the federal laws as well as the federal regulations that implement those laws is reproduced below.

Note that these provisions do not require board members who work for entities that hold a permit under the Clean Air Act, such as a Title V permit or a Federally Enforceable State Operating permit (FESOP), or the Clean Water Act, such as an NPDES discharge permit, to recuse themselves from voting on rules before the board. Rather, both the state and federal laws require disclosure of that fact under the conflict of interest provisions. Each member of the ERB will be asked to fill out a disclosure form in accordance with state and federal law.

Both the Clean Air Act and Clean Water Act have provisions related to a board approving enforcement orders. The ERB does not approve IDEM enforcement orders under either state air or water regulations. IDEM is in the process of removing NPDES permits-by-rule from the administrative code, through a rulemaking action which will come before the ERB. This will remove the conflict whereby a permit is “issued” via a rule. Such permits will be administratively issued, just as individual NPDES permits are issued. Any permits-by-rule under Indiana’s air regulations are not part of Indiana’s State Implementation Plan (SIP) which must be approved by EPA.

Each member of the ERB is required to take ethics training administered by the Office of the Inspector General. The statutory definition of “special state appointee”, which includes board members, and the pertinent rule from the state ethics code is reproduced below. There is also a State Ethics Advisory Opinion included in the packet for your information.

IC 13-13-8-11

Disclosure of conflicts of interest

Sec. 11. Each member of the board shall fully disclose any potential conflicts of interest relating to permits or enforcement orders under the:

- (1) federal Clean Air Act (42 U.S.C. 7401 et seq.), as amended by the Clean Air Act Amendments of 1990;
- (2) federal Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.);
- (3) federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the federal Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9601 through 9675);
- (4) federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); and
- (5) federal Safe Drinking Water Act (42 U.S.C. 300f through 300j).

Clean Air Act, Section 128

(a) Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that:

- (1) any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and
- (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraph (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

Clean Water Act, Section 304 [33 U.S.C. Section 1314(i)(2)(D)]

(i) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

The Administrator shall: . . .

(2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

- (A) monitoring requirements;
- (B) reporting requirements (including procedures to make information available to the public);
- (C) enforcement provisions; and
- (D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

40 CFR 123.25 Requirements for state programs (The federal regulation implementing Section 304 of the Clean Water Act)

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

- (i) *Board or body* includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.
- (ii) *Significant portion of income* means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.
- (iii) *Permit holders or applicants for a permit* does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.
- (iv) *Income* includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received “directly or indirectly from permit holders or applicants for a permit” when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

IC 4-2-6-1 Definitions

(18) "Special state appointee" means a person who is:

- (A) not a state officer or employee; and
- (B) elected or appointed to an authority, a board, a commission, a committee, a council, a task force, or other body designated by any name that:
 - (i) is authorized by statute or executive order; and
 - (ii) functions in a policy or an advisory role in the executive (including the administrative) department of state government, including a separate body corporate and politic.

42 IAC 1-5-6 and IC 4-2-6-9

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

- (1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or
- (2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.